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SERVICE DATE - DECEMBER 31, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42077

ARIZONA PUBLIC SERVICE CO. & PACIFICORP

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: December 23, 2003

Arizona Public Service Company and PacifiCorp (collectively, Arizona) have notified the Board that they wish to withdraw their rate reasonableness complaint in the above-captioned proceeding, and have requested that the Board approve the withdrawal and discontinue this proceeding without prejudice. Arizona has also asked for a full or partial refund of the filing fee that it tendered with its rate complaint. The Board will grant Arizona's request to withdraw its complaint without prejudice and will discontinue this proceeding, but it will deny Arizona's petition for a filing fee refund.

BACKGROUND

On January 30, 2003, Arizona initiated this proceeding (STB Docket No. 42077) by filing a complaint against The Burlington Northern and Santa Fe Railway Company (BNSF), charging that BNSF's common carrier rates for the transportation of coal from the Lee Ranch Mine in New Mexico to Arizona's Cholla Station electric generating plant (Cholla) near Joseph City, AZ, are unreasonable. Also on January 30, 2003, Arizona asked to have this proceeding consolidated with Docket No. 41185, a separate rate reasonableness proceeding involving the same parties. In a decision served on May 12, 2003 (May 12 Decision), the Board denied Arizona's petition to consolidate. Arizona filed a petition for reconsideration of the May 12 Decision, which the Board denied in a decision in Docket No. 41185, served on October 14, 2003.

While the Board was reviewing Arizona's petition to reconsider the May 12 Decision, Peabody Energy Corporation (Peabody) — the operator of the Lee Ranch Mine — filed a petition to intervene in STB Docket No. 42077 and a petition for injunctive relief. (Peabody sought a Board order directing BNSF to charge no more than the maximum rate permitted in a contract that, up until its expiration on December 31, 2002, had governed BNSF coal transportation service between Lee Ranch and Cholla.) The Board denied Peabody's injunction petition, and dismissed as moot without prejudice Peabody's petition to intervene in a decision served October 14, 2003.

On December 4, 2003, Arizona filed a request for permission to withdraw its rate reasonableness complaint in STB Docket No. 42077 and for a Board order permitting withdrawal and discontinuing the proceeding without prejudice. In a petition accompanying its withdrawal filing, Arizona requested that the Board, upon issuance of a decision granting its withdrawal request, grant a full or partial refund of the filing fee that it had submitted with its rate complaint on January 30, 2003.

## DISCUSSION AND CONCLUSIONS

### Withdrawal and Discontinuance of Proceeding

Arizona's request to withdraw its complaint in STB Docket No. 42077 without prejudice is reasonable and will be granted. Pursuant to Arizona's request, this proceeding will be discontinued.

### Refund of Filing Fee

As set forth at 49 CFR 1002.2(c), filing fees submitted in connection with complaints accepted for filing by the Board are not refundable, even if the subject complaint is subsequently withdrawn.

In support of its refund request, Arizona relies on Docket No. 32760 (Sub-No. 39), Union Pacific Corp., et al. — Control and Merger — Southern Pacific Corp., et al., (STB served Dec. 8, 2000) (Union Pacific). The filing fee refund in Union Pacific, however, does not represent an exception to the rule at section 1002.2(c). Rather, in that case, the filing party's pleading (an appeal of a labor-related arbitration award) was untimely and therefore not accepted for consideration by the Board. Arizona's rate complaint, on the other hand, was not procedurally defective, and thus was accepted and acted upon by the Board, as were various pleadings related to the complaint. Therefore, consistent with the Board's regulations at section 1002.2(c), Arizona's refund request will be denied.

### It is ordered:

1. Arizona's request to withdraw its complaint in STB Docket No. 42077 without prejudice is accepted, and, accordingly, the proceeding is discontinued.
2. Arizona's petition for a fee refund is denied.

3. This decision is effective as of its service date.

By the Board, Chairman Nober.

Vernon A. Williams  
Secretary